No. 83-1189

In The

Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF THE NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT and "ABBY" and "RICHARD" by their Guardian ad Litem, JOHN P. BRACKEN,

Petitioners,

-against-

GORDON M. AMBACH, individually and in his official capacity as Commissioner of Education of the State of New York, and JOSEPH J. BLANEY, individually and in his official capacity as Acting and/or Deputy Commissioner of Education of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Do handicapped students who successfully complete their prescribed course of study have a property right under the Fourteenth Amendment in the receipt of a local high school diploma?

2. Do handicapped students who successfully complete their prescribed course of study have a liberty interest under the fourteenth Amendment to be free from the adverse stigma of "incompetency" created by the state's revocation of their high school diplomas?

3. Did the state deny the handicapped students' property right and liberty interest by failing to give the students adequate notice of the denial of their receipt of a high school diploma based upon their failure to pass all or part of a "competency test"?

4. Does a state violate a handicapped student's property right or liberty interest when it revokes a high school diploma as a result of failure to pass all or a part of a competency test which lacks content, curricular, construct or predictive validity as applied to handicapped students?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners, BOARD OF EDUCATION OF THE NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, and ABBY and RICHARD, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals entered in this proceeding on October 20, 1983.

OPINION BELOW

The opinion of the New York State Court of Appeals and the opinion of the Appellate Division of the State Supreme Court (90 A.D.2 227, 1982), upon which it rested in large measure, appear in the Appendix herto. The opinion of the Supreme Court, Albany County, reported in 107 Misc. 2 830, 1981, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on October 20, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

This proceeding seeks a declaratory judgment and injunctive relief to vindicate the constitutional rights of two handicapped students whose high school diplomas have been revoked by the New York State Commissioner of Education. The revocation was premised upon the students' failure to pass all or part of certain competency tests imposed by respondents as a prerequisite to graduation starting with the Class of 1979.

Competency testing was instituted in the State of New York in response to demands by the State Board of Regents for greater student accountability. Originally designed to identify students needing remediation in reading and mathematics, the tests were ultimately adopted as a testing prerequisite to receipt of a diploma. It is uncontroverted that the tests were developed and constructed without reference to handicapped pupils, their curriculum and special needs. Not unexpectedly, the impact upon handicapped students has been devastating. Handicapped stu-

dents who realize that diploma receipt due to the competency test requirement is out of reach have begun to drop out of school. At ABBY'S high school for brain injured and emotionally disturbed students, 53.3% failed the reading test and 89.2% did not pass the mathematics test. At another local institution for emotionally disturbed pupils, 44% failed the mathematics test and 12% did not pass the reading test. These high rates of failure for physically handicapped and emotionally disturbed pupils contrast with less than a 1% failure rate for the New York non-handicapped student population. The resulting diploma denial has foreclosed these students from obtaining even menial entry-level jobs in both the private and public sector.

Both ABBY and RICHARD, who were recognized as handicapped pupils within the provisions of the Education for the Handicapped Act, 20 U.S.C. Section 1401, et seq., had successfully completed the requirements of their prescribed course of high school study in the opinion of the Northport Committee on the Handicapped. (The latter, composed of local educators and parents, exists to establish and monitor the education of handicapped students under the Education for the Handicapped Act.) ABBY, a child with normal intelligence who suffers from a neurological impairment that inhibits her mathematical ability, passed the reading portion of the competency test; this test was designed so that a student in the 9th grade could be expected to answer 80 percent of the questions correctly. She did not pass the mathematics portion of the competency test. RICHARD is a trainably mentally retarded youth who failed to pass both portions of the competency test. As a result, ABBY was to have received neither a diploma nor certificate at graduation; RICHARD was eligible to receive a certificate of attendance, designed specifically for mentally retarded pupils.

It was not clarified by the Commissioner of Education and State Board of Regents that the requirement of passage of the competency tests would apply to handicapped pupils until April of 1979, two months before the students' graduation; the debate at state level regarding applicability occurred during the winter and spring of 1979. Notice of applicability was never given individually to petitioner students by respondents, and the state did not directly advise the school district of applicability until it issued an April 1979 memorandum (R.A. 318.) The Chief of the State Education Department's testing program testified that the competency tests, although made applicable to handicapped pupils, were developed and constructed without regard to the curriculum or course of study of handicapped children; the tests wholly fail to meet even minimum test validity criteria of the American Psychological Association's "Standards for Educational and Psychological Tests." (See *Wasington v. Davis*, 426 US 248 (1976) for this Court's reliance on the APA standards.) No proof was shown by respondents that the enunciated purpose of the test, to determine if a student could "survive in society as an adult, parent and citizen" was achieved by the test. The Chancellor of the Board of Regents himself stated,

> "...to grant students a certificate (an inferior academic award) based on attendance or any other standard is to brand a group of students as second-rate and incapable of running the race reserved for other students. Furthermore, such a certificate, or any other substitute diploma, does not provide the recipient with the same opportunities for gaining employment or college entrance which accompanies a diploma." (R.A. 679.)

Prior to ABBY and RICHARD'S graduation, respondent Commissioner himself advised the New York Board of Regents of the adverse impact and stigma of diploma denial based upon application of the competency tests to handicapped pupils. (Exhibit 29F, R.A. 451.) Therein he suggested that alternative criteria of diploma award be applied to handicapped students, primary among which was reliance upon the student's accomplishments apropos of his individual education plan. The latter is a comprehensive program individually tailored to student ability and need by the local Committee on the Handicapped. This measure of successful completion of high school study was utilized by the petitioner School Board in awarding ABBY and RICHARD a diploma.

Following the Board's action, the Commissioner of Education ordered revelation of the students' names to permit him to revoke their diplomas based upon the petitioner School Board's failure to require ABBY and RICHARD to pass the competency tests. (Soon after the Court of Appeals decision, ABBY and RICHARD'S diplomas were revoked.)

Thereafter petitioners instituted the within suit and the Supreme Court, Albany County (Williams, J.), granted judgment finding that the Commissioner's then intended action and the regulation upon which it was based was violative of the Due Process Clause of the Fourteenth Amendment. (See Appendix C hereto.) On appeal, the Appellate Division, Third Department (Maloney, J.) reversed holding that the students had no property interest in diploma receipt nor liberty interest in being free from the stigma of incompetency. (See Appendix B hereto.) On October 20, 1983, the Court of Appeals affirmed the Appellate Division decision resting upon that Court's opinion. (See Appendix A hereto.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW EFFECTIVELY FORECLOSES CERTAIN HANDICAPPED PUPILS FROM FULL PARTICIPATION IN AMERICAN SOCIETY.

A time honored and cherished concept is basically at issue in this case—that individuals be free from patently unfair acts occasioned by the state. Handicapped individuals, no less than other citizens, are entitled to this protection.

Recent public pronouncements by elected officials regarding the current state of education in our country have sparked myriad responses, including programs for greater teacher and student accountability. The latter has focused upon the use of "competency" testing, the technique employed by New York State, in its words, to determine if a pupil can survive in society as "a parent, citizen and adult." The linchpin of the program is the use of diploma denial as the sanction for student failure to pass all or part of the tests. Constructed and developed solely with reference to non-handicapped pupils, the state has chosen to apply it to handicapped students.

New York is not alone in its blind application of competency testing to handicapped children. At the time of trial, twenty states had instituted competency testing, many using the examination as a device upon which to deny high school diplomas to handicapped youngsters. (Exhibit 29, R.A. 653.)

This precipitate nationwide rush and apparent anxiety to establish student accountability has resulted in a great number of handicapped pupils having been denied diplomas in New York. (See also, *Brookhart v. Illinois*, 697 F2 182, 7th Cir, 1983.)

A high school diploma is the traditional reward accorded to a student to evidence successful completion of his/her education, the curricular content of which is both mandated and established by school officials. Where, as in New York, a state undertakes to offer its residents a free education, compels attendance and establishes a course of study, it must "... recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." *Goss v. Lopez*, 419 U.S. 656 (1975). Based upon this rule of law, the Fifth Circuit stated,

> "From a student's point of view the expectation is that if a student attends school during those required years, and indeed more, if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally." *Debra P. v. Turlington*, 644 F2 397, (5TH Cir, 1981), at 404

The denial of a diploma to a handicapped student, due to failure of the competency tests result in myriad deprivations. First, and foremost, a high school diploma is the traditional symbol provided to students who have successfully completed their prescribed course of instruction and is an integral part of the educational process. Indeed, it is the logical extension of dutiful attendance and study year in and year out. When the diploma is denied to handicapped students, based upon the state's finding of " incompetency," their lives are affected in a demeaning, traumatic and stigmatizing manner. Secondly, gainful employment in the public and private sectors is effectively foreclosed. (R. 430-438.) Thirdly, because of the competency test requirements, pupils with handicapping conditions anticipate failure on the tests, developed without regard to their abilities, and drop out of school. (R. 415.) They have begun to drop out of school not because they are incapable of learning, but because they expect deprivation of the age-old incentive which keeps many youngsters in school—the high school diploma.

Both appellate courts below determined that ABBY and RICHARD'S property interest in receipt of a diploma could not be grounded upon a unilateral expectation of receipt of a diploma; or, as the Court of Appeals stated, "... the petitioning students had no reasonable expectation of receiving a high school diploma without passing the competency tests." However, the students' expectation was far from unilateral. First, the Northport School District consistently awarded diplomas to handicapped students who completed the goals and objectives of their individual education plans prior to 1979. (R. 206, 372.) Secondly, the applicability of the competency test requirement to diploma receipt by handicapped youngsters was still under debate in the winter and spring of 1979. (Exhibit 29, A. 451.) The Appellate Division stated in its decision that "... it was not definitely clarified by the State Education Department until April of 1979 that the requirement of passing the basic competency tests would apply to handicapped students..." (R. AD. 16, footnote 7.) In view of the pre-1979 practice of awarding diplomas to handicapped students and the admitted ambiguity occasioned by the respondents' own lack of clarity in expressly enunciating the application of the competency test requirement to handicapped pupils, it is absurd to characterize ABBY and RICHARD'S expectation of diploma receipt as "unilateral." One of the essential tenets of procedural due process is clear an unambiguous notice. (*Goss v. Lopez*, supra.) The court below conveniently avoided the established fact that ABBY passed the reading portion of the competency test, thereby demonstrating a reading ability acceptable to the State of New York, at a 9th grade level. (R. 973.) Further, the very program in which she was enrolled as a student was characterized by State Education Department officials as a "...diploma granting program..." (Exhibit X, R.A. 801.)

Incredibly, the appellate courts below ignored the global nature of the stigma occasioned by the state's acts upon ABBY and RICHARD. The very name of the test "basic competency" implies that those who fail to pass are "incompetent." (R. 584.) Further, the test is not merely a measure of achievement in mathematics and reading. Rather, the announced state purpose of the exam was repeatedly, and presumptively, characterized as a measure of a student's ability to survive in society as an adult, parent and citizen. (R. 593, 708.) Hence, denial of a diploma in the context of this purpose applies a sweeping stigma that the youngster is incompetent and cannot survive in society at large, thereby unconstitutionally denying a student's liberty interest in being free from adverse stigma imposed by the state. *Goss*, supra., 419 U.S. at 574; *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Brookhart v. Illinois*, supra., at 614-615.

The appellate courts below emphasized their assumption that ABBY and RICHARD would never have been able to pass all or part of the competency tests. Certainly, at the time of final notice to their educators of the applicability of the test requirement to the handicapped, i.e., March of 1979, insufficient time remained for adequate preparation of the students to take the tests. However, as one of petitioners' expert witnesses testified, had the students been given notice in the third or fourth year of education, they would have been adequately prepared to take and pass all of the competency tests. (R. 636.) The trial court was unwilling to assume that the student could "never" pass the competency tests. Indeed, the court indicated such a factual determination could not be made since early notice had not been given, thereby denying the students "every opportunity to pass the BCTs." (Appendix C, at page 58.)

While competency testing may be a laudable technique when applied to the non-handicapped, its application to handicapped pupils, late in their educational career, is patently unfair and devastating in impact.

There is no Supreme Court precedent speaking directly to such diploma denial. There is little more among the circuit courts and highest state courts, and what does exist is in irreconcilable conflict.

2. THE DECISION BELOW CONFLICTS DIRECTLY WITH A DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WHICH, IN AN IDENTICAL CASE, FOUND HANDICAPPED PUPILS' PROPERTY RIGHTS AND LIBERTY INTERESTS VIOLATED BY BELATED APPLICATION OF A COMPETENCY TEST USED TO DENY THE AWARD OF HIGH SCHOOL DIPLOMAS.

A prime reason for seeking certiorari in this case is to obtain the review of the Supreme Court of the within case and *Brookhart*, supra., which decisions are diametrically opposed. The decision appealed from directly conflicts with and ignores the holding of the Seventh Circuit Court of Appeals in *Brookhart*, supra. The facts of *Brookhart*, supra., were *identical* to those before the New York State Court of Appeals. Therein several handicapped students, including students who suffer from the same handicapping conditions as ABBY and RICHARD, contested the action of the Peoria board of education. The board had denied them diplomas because of their failure to pass all or a part of a competency test. The Seventh Circuit stated, at 615, in resting upon the decision of the trial court (the New York State Supreme Court, Albany County) in the instant matter,

> "*Board of Education v. Ambach*, 436 N.Y.S.2 564, 573-575 (S. Ct., Albany Co.,) was a case essentially on all fours with this one. After finding that two handicapped plaintiffs had a protected liberty or property interest in receipt of a diploma, the court held that the school board (sic., Commissioner of Education) unconstitutionally deprived them of their interest because inadequate notice precluded preparation for

> the exam. Following these precedents, we hold that plaintiffs were entitled to notice permitting reasonable preparation for the M.C.T."

The New York State Court of Appeals has wholly ignored the *Brookhart*, supra., decision and there now exists a direct conflict in the law respecting the rights of handicapped pupils to receive adequate notice to prepare for an examination that could result in diploma denial. (Adequate notice, for ABBY and RICHARD, in the opinion of the New York Supreme Court, would have been given at least at the fourth or fifth grade. See Appendix C, page 58 of the attached opinion of that court.) Further, the conflict of opinions between the New York Court of Appeals and *Brookhart*, supra., relates directly to whether a handicapped pupil possesses a liberty interest under the Fourteenth Amendment to be free from the devastatingly adverse stigma of being labeled by the state as "incompetent" for life, when a diploma is denied due to failure of a 'competency' test; and whether such a liberty interest, independent of a property interest in the diploma, requires that the handicapped pupil be afforded a substantial period of time to prepare for the exam. Applicants submit that the Seventh Circuit Court of Appeals appropriately held, at 616, that,

> "The analysis prescribed by the Supreme Court in *Mathews v. Eldidge*, 424 U.S. 319, also dictates advance notice. The private interest at stake here is an interest in protecting reputation and in qualifying for future employment opportunities. The governmental interest in upgrading the value of a diploma is also significant. However, the risk of an erroneous deprivation of plaintiffs' interest in this case is overwhelming because of the near-total lack of exposure to the material tested. Requiring earlier notice and the attendant opportunity to learn the material will greatly decrease the risk of erroneous deprivation.

"As described in *Board of Educ. v. Ambach*, supra., at 574-575, early notice would thus have benefitted plaintiffs in two ways: it 'would allow for proper consideration of whether the goals of the student's IEP's should include preparation for the M.C.T. and would afford an appropriate time for instruction aimed at reaching that goal.'"

In short, there is a clear and irreconcilable conflict between the Seventh Circuit and the New York Court of Appeals over whether students such as ABBY and RICHARD have a liberty interest under the Fourteenth Amendment to be free from the stigma of incompetency and are therefore entitled to sufficiently early notice to prepare for a competency test used to deny receipt of a high school diploma.

3. THE DECISION BELOW CONFLICTS WITH A DECISION OF FIFTH CIRCUIT COURT OF APPEALS WITH RESPECT TO A STUDENT'S PROPERTY INTEREST IN DIPLOMA RECEIPT AND THE ALLOCATION TO THE STATE OF THE BURDEN OF PROVING THE CONSTRUCT AND CURRICULAR VALIDITY OF A COMPETENCY TEST AS APPLIED TO HANDICAPPED STUDENTS.

A second prime reason for seeking certiorari in this case is to seek the review of the Supreme Court of the apparent conflict between the decision of the Fifth Circuit Court of Appeals in *Debra P. v. Turlington*, supra, and the decision of the New York State Court of Appeals herein, respecting major issues of constitutional importance. In *Debra. P.*, supra., a class of black students sought, based upon the Due Process Clause, to attack the denial of diplomas to them by the State of Florida due to their failure of a state sponsored "functional literacy test." The Fifth Circuit held that the students possessed both a property interest in receipt of a diploma and a liberty interest in being free from the adverse stigma that would attach from denial of a diploma due to failure of a "functional literacy test." However, the New York State Court of Appeals determined that 'Abby' and 'Richard' did not possess a "reasonable expectation of receiving a diploma without passing the competency tests" and therefore did not possess a property interest in diploma receipt. In direct conflict with this holding is the Fifth Circuit's determination in *Debra P.*, supra., that,

> "It is clear that in establishing a system of free public education and in making school attendance mandatory, the state has created an expectation in the students. From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally. See Goss v. Lopez, 419 U.S. 565, 579, 95 S. Ct. 729, 738, 42 LEd. 2d 725, 737 (1975)" (644 F2 397, at 404.)

In essence, the contrary rulings rest upon the application of this Court's standards to determine the existence of a student's property interest as established by *Goss*, supra. Petitioners urge that the student's property interest in diploma receipt is *not* to be measured against the belatedly imposed, singular criteria of a competency test; rather it is to be determined based upon the understanding of the student at the time of commencement, and during the bulk of the child's educational career that if all assigned courses are passed, a diploma will be received at graduation. Additionally, the Fifth Circuit held that the state, under the doctrine of 'substantive due process', must bear the burden of proving the construct and curricular validity of the functional literacy test. (*Debra P.*, at 402, 405 and 407; see also, *Washington v. Davis*, supra.) Herein, the New York Court of Appeals failed to apply these burdens to the Commissioner of Education. Under these requirements, the state would first have to demonstrate that the test in fact tested whether a student could ' survive in society as a parent, citizen and adult', the purpose of the exam as announced by the State of New York. Secondly, the Commissioner of Education would have to prove that the subject matter tested was taught to handicapped pupils during their educations. The Commissioner failed to meet the foregoing burdens of

proof; in fact, the State of New York wholly ignored handicapped pupils and their courses of study in construction and development of the competency test.

Parenthetically, while litigation concerning competency testing has arisen in New York, Florida, Georgia and Illinois, at the time of trial twenty states were using competency tests as a diploma granting mechanism. The applicability of the test requirement to handicapped students ranges from the New York model to those states where handicapped pupils are exempt.

Less drastic alternatives exist to gauge the achievements of handicapped students respecting completion of their individual education plans. The respondents, however, have blindly chosen to do so by use of a test that ignores the content and purpose of the education of the handicapped. Having done so, the decision of the court below upholding respondents' acts conflicts irreconcilably with the decision of the Fifth Circuit in *Debra P.*, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of New York

Respectfully submitted,

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APPENDIX A: MEMORANDUM

State of New York
Court of Appeals

No. 416

In the Matter of the Board of Education of the Northport-East Northport Union Free School District,

Appellant,

and "Abby" and "Richard" by their Guardian ad Litem, John P. Bracken,

Intervenors-Appellants,

v.

Gordon M. Ambach, individually and as Commissioner of Education of the State of New York, et al.,

Respondents.

(416) John H. Gross, Northport, for appellants.

John P. Bracken, East Setauket, for cross-appellant guardian ad litem.

James H. Whitney, Robert D. Stone, & Seth Rockmuller, Albany, for respondent/cross-appellant Commissioner.

MEMORANDUM

The order of the Appellate Division should be affirmed, with costs, to the respondents against the Board of Education.

We would note that under the circumstances of this case the petitioning students had no reasonable expectation of receiving a high school diploma without passing competency tests. Nor on the record can it be said that they were denied adequate notice of the requirement, in view of the fact that the regulation had been in effect for three years prior to the completion of their studies. For the reasons stated in the opinion of Presiding Justice A. Franklin Mahoney at the Appellate Division, the petitioners' other contentions do not warrant the relief requested.

Order affirmed, with costs to respondents against appellant Board of Education, in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

Decided October 20, 1983

APPENDIX B

90 A.D.2d 227

In the Matter of BOARD OF EDUCATION OF NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, Respondents-Appellants,

and

"Abby" and "Richard," Infants, by John P. Bracken, Their Guardian ad Litem, Intervenors-Respondents-Appellants,

v.

Gordon M. AMBACH, Individually and as Commissioner of Education of the State of New York, et al., Appellants-Respondents.

Supreme Court, Appellate Division,
Third Department.

Dec. 9, 1982.

Action was filed on behalf of two handicapped students who had been attending public school to enjoin Commissioner of Education and local board of education from enforcing order invalidating diplomas received by high school students, and to obtain a judgment validating the issuance of diplomas to them. The Supreme Court, Special Term, Albany County, Robert C. Williams, J., 107 Misc.2d 830, 436, N.Y.S.2d 564, enjoined enforcement of order, and appeal was taken. The Supreme Court, Appellate Division, Mahoney, P.J., held that: (1) board of education and handicapped students had failed to demon-

strate any violation of Rehabilitation Act; (2) three-year notice was not of such a brief duration as to prevent school districts from programming individualized education programs of remedially handicapped children to enable them to pass basic competency tests required for diploma graduation; (3) protection of integrity of high school diploma is both a legitimate state interest and one to which competency testing program is reasonably related, and thus invalidation of diplomas did not violate equal protection; and (4) since it was improper act of board of education which prompted administrative action taken by Commissioner of Education and others which became subject of proceeding, guardian ad litem fees should be assessed against that party.

Ordered accordingly.

Ingerman, Smith, Greenberg & Gross, Northport (John H. Gross, Northport, of counsel), for respondents-appellants.

Robert D. Stone, Albany (James H. Whitney, Albany, of counsel), for appellants-respondents.

John P. Bracken, East Setauket, Guardian ad Litem, for intervenors-respondents-appellants.

Before MAHONEY, P.J., and KANE, MAIN, MIKOLL and YESAWICH, JJ.

MAHONEY, Presiding Judge.

In the years between 1969 and 1971, the New York State Department of Education, concerned over the decrease in college board scores and reports that increasing numbers of students were graduating from high school lacking basic skills,

particularly in reading and mathematics, formed a unit known as the State Examination Task Force and charged it with the responsibility of reviewing the State examination program at the high school level and recommending how that program might be improved so as to increase the basic skills of graduates who did not qualify or did not choose to take the Regents examinations. The task force recommended expansion of the existing programs to include increased emphasis on the basic skills of reading, writing and mathematics. This recommendation evolved into an evaluation plan introduced in 1973 which set forth long-range plans for instructional support and included, as one of its key components, a proposal that the State add basic competency tests in certain basic skills during the high school years.

After in-depth staff discussions, aided by input of educators in the public school system throughout the State, a decision was made that basic competency would be tested only in reading and mathematics. Advisory committees were formed and planning began both as to the content of the examinations and the methodology to be used in administering them. The ultimate tests were designed to have an average difficulty level that would permit the average student in the ninth grade to answer 80% of the questions correctly. Field tests in 1974 indicated that the test contents were valid in that the resultant scores were object related. In March of 1976, the Board of Regents adopted a proposal which made passing the basic competency tests a requirement for high school graduation beginning with the graduating class of June, 1979. Neither the State policy articulated in the proposal passed by the Board of Regents in March of 1976, nor the regulations incorporating the requirement of competency tests subsequently adopted by the Commissioner of Education in July of 1978 (8 NYCRR 103.2[a][2]) made any provision for the use of alternative testing techniques for handicapped stu-

dents or any exception from the diploma requirement for handicapped students who could not be expected to pass the tests.[1]

In the matter before us, "Abby" and "Richard" were students in the Northport-East Northport Union Free School District and both were classified as handicapped.[2] The school district, although fully aware of the requirements of the State regulation, awarded diplomas to these two students in June of 1979 on the basis of successful completion of their respective individualized education programs (IEPs). Neither student had successfully completed both of the basic competency tests.[3].

By order dated August 8, 1979, respondent Commissioner of Education directed petitioner board of education of the school district to reveal the names of any students to whom high school diplomas had been awarded in violation of part 103 of the commissioner's regulations in order to revoke unauthorized diplomas. Petitioner then commenced this CPLR article 78 proceeding to permanently enjoin respondents from enforcing that directive. On September 18, 1979, Special Term preliminarily enjoined respondents from enforcing the August, 8, 1979 order and subsequently determined, *sua sponte*, that Abby and Richard should be permitted to intervene in the proceding and appointed a guardian ad litem for that purpose. Following a trial on a number of issues pursuant to CPLR 7804 (suPd. [h]), Spe-

1. Regulations dealing with alternative testing techniques for pupils with handicapping conditions were subsequently promulgated (see 8 NYCRR 103.2 [a][2][ii]).

2. Abby suffers from a neurological impairment (8 NYCRR 200.1[cc][3]) while Richard is mentally retarded (8 NYCRR 200.1 [cc][4]).

3. Abby passed the basic competency test in reading but failed the mathematics exam. Richard was not given either of the basic competency tests, apparently because he was not capable of passing either exam.

cial Term directed entry of judgment granting the petition to the extent of permanently enjoining respondents from enforcing the August 8, 1979 order and holding that the requirements of 8 NYCRR 103.2 were in violation of Abby and Richard's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution (see 107 Misc.2d 830). Special Term denied those portions of the petition which sought relief based upon violations of Abby and Richard's rights under (1) the equal protection guarantees of both the Federal and State Constitutions (U.S. Const., 14th Amdt.; N.Y. Const., art I, § 11), (2) section 504 of the Rehabilatation Act of 1973 (U.S. Code, tit. 29, § 794), (3) the Education of the Handicapped Act and the Education for All Handicapped Children Act of 1975 (U.S.Code, tit. 20, § 1401 *et seq.*), and (4) section 1983 of the Civil Rights Act (U.S. Code, tit. 42).[4] Cross appeals involving all parties ensued, in addition to a separate appeal by respondents from that portion of an amended judgment which directed that the $6,000 in attorney's fees awarded to Abby and Richard's guardian ad litem be recovered from respondents.

[1,2] Before turning to the consitutional and statutory issues, the resolution of which are dispositive, we first reject the contention that respondents do not have the power to determine educational policy in this State and to establish criteria for high school graduation. Indisputably, control and management of educational affairs is vested in the Board of Regents and Commissioner of Education (N.Y. Const., art. V, § 4; art. XI, § 2; Education Law, §§ 207, 305; see *Matter of New York City School Bds. Assn. v. Board of Educ. of City School Dist. of City of N.Y.*, 39 N.Y.2d 111, 116, 383 N.Y.S.2d 208, 347 N.E.2d 568) and determinations of the commissioner, unless patently violative of statutory or constitutional mandate, are beyond the

4. Special Term dealt with the issues raised only insofar as they related to Abby and Richard. It declined to discuss their effect on handicapped children as a class.

range of judicial oversight (*Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352). The adoption of regulations with respect to graduation requirements, including basic competency examinations, to establish a standard that would make a high school diploma in this State a meaningful credential of the graduate, is clearly within the authority and power of respondents.

Section 504 of the Rehabilitation Act of 1973

We conclude that Special Term correctly held that petitioners' had failed to demonstrate any violation of section 504 of the Rehabilitation Act of 1973. That section provides:

> No *otherwise qualified handicapped individual* in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (emphasis added) (U.S.Code, tit. 29,§ 794).

The United States Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 in construing section 504 in connection with the right of a post-secondary nursing school to deny admission to a hearing impaired applicant, found this practice to be permissible within the concept of whether the petitioner was an "otherwise qualified handicapped individual" within the meaning of section 504. The Supreme Court held that"[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite of his handicap" (id.* at 406, 99 S.Ct. at 2367; emphasis added). The court also noted that "[s]ection 504 by its

terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate" (*id.* at 405, 99 S.Ct. at 2366). The statute merely requires even-handed treatment of the handicapped and non-handicapped, rather than extraordinary action to favor the handicapped. The Supreme Court in *Davis (supra)* recognized this statutory purpose by stating:

> Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so (*id.* at 411-412, 99 S.Ct. at 2369-2370).

[3] It follows, therefore, that in *Davis*, as here, discrimination against a handicapped person in violation of section 504 of the Rehabilitation Act of 1973 arises only when benefits are denied to an individual who is able to meet all of a program's requirements in spite of his handicap. In the matter before us, Abby is neurologically impaired and Richard is mentally retarded. Abby's IEP included a work study program in horticulture and silk screening and an academic program at the second grade level in mathematics and the third grade level in reading. Richard, concededly, was not intellectually able to pass either of the basic competency tests. Accordingly, respondents' action, as evidenced by its order of August 8, 1979, did not violate section 504 of the Rehabilitation Act of 1973 since neither Abby nor Richard was an "otherwise qualified handicapped individual."

5. The term "petitioners" includes the board of education and the intervenors.

Education of the Handicapped Act and the Education for All Handicapped Children Act of 1975

[4] Next, we also reject petitioners' contention that the provisions of the Education of the Handicapped Act and the Education for All Handicapped Children Act of 1975 mitigate against the withholding of a diploma from a handicapped student who is unable to meet minimum competency standards. The Federal regulations designed to further the purposes of these acts and relied upon by petitioners do not mandate the award of diplomas to handicapped students who cannot meet the criteria required for graduating. To the contrary, article 89 of this State's Education Law was promulgated to insure compliance with the Federal acts and subdivision 3 of section 4403 of the Education Law states that it shall be the duty of the State Education Department to formulate such rules and regulations pertaining to the physical and educational needs of handicapped children as the commissioner shall deem to be in their best interest. In sum, the Federal acts dealing with education for handicapped students merely provide that the States have procedures to assure that testing and evaluation materials and procedures be provided for the placement of handicapped children. The United States Supreme Court in *Board of Education v. Rowley*,——U.S.——, 102 S.Ct. 3034, 73 L.Ed.2d 690, in that court's first review of the Education for All Handicapped Children Act of 1975, held that a State which receives Federal funds to educate handicapped children need not provide personalized aids, in *Rowley* a qualified sign language interpreter for a deaf student, for students who are being provided adequate instruction calculated by local school administrators to meet their educational needs. In the matter before us, both Abby and Richard were provided with IEPs commensurate with their educational needs and thus we cannot say that were denied their right to a "free appropriate public education" (U.S.Code, tit. 20, § 1412, subd. [1]).

Section 1983 of the Civil Rights Act

[5] Since we concur with the finding by Special Term that respondents' acts did not violate either section 504 of the Rehabilitation Act of 1973 or the Federal acts relating to education of handicapped children, we need not discuss petitioners' actions pursuant to section 1983 of the Civil Rights Act which depend for their validity upon violations of these statutes. Further, we note that although this proceeding was commenced to prevent respondents from compelling petitioner board of education to furnish information about students upon whom the board had conferred diplomas, the proceeding is, in essence, a review of the amendments to part 103 of the regulations of the Commissioner of Education which require the attainment of minimum competency in basic skills in order to obtain a high school diploma. We submit that the promulgation of regulations is a legislative act and, for purposes of section 1983 actions, respondents have absolute immunity (see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404—405, 99 S.Ct. 1171, 1178—1179, 59 L.Ed.2d 401). We also hold that respondents, as government officials perfoming discretionary functions, acted as administrative officers and are shielded from liability for civil damages by a qualified immunity so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware (see, e.g., *Harlow v. Fitzgerald*, ——U.S.——, ———, 102 S.Ct. 2727, 73 L.Ed.2d 396, 408—409). We shall return to these section 1983 actions in our subsequent discussion of respondents' alleged violations of the intervenors' constitutional rights.

[6]-New York State's Constitution places the obligation of maintaining and supporting a system of public schools upon the Legislature (N.Y. Const., art. **XI,** § 1) and that body has vested authority to control and manage educational affairs in the Board of Regents and Commissioner of Education (see N.Y. Const., art. **XI,** § 2; Education Law, § 207). As previously discussed, the courts traditionally have declined to interfere with this broad grant of discretion (*Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445, 418 N.Y. S.2d 375, 391 N.E.2d 1352, *supra*). Notwithstanding this policy, due process requires the courts to interfere when the State education system unconstitutionally deprives a student of a liberty or a property interest (see *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; *James v. Board of Educ. of City of N.Y.*, 42 N.Y.2d 357, 397 N.Y.S.2d 934, 366 N.E.2d 1291). Here, petitioners insist judical inquiry is necessary to protect both the liberty and property interests of Abby and Richard. We disagree.

A property interest exists when an individual has a "legitimate claim of entitlement" in a particular benefit (*Board of Regents v. Roth, supra*, 408 U.S. p. 577, 92 S.Ct. p. 2709). Special Term found that Abby and Richard had a legitimate expectation of receiving a diploma and that such document represented a property interest. We must reject this conclusion because it is based on the false premise that Abby and Richard are capable of completing the requirements for graduating with a diploma as distinguished from graduating with a certificate.[6]

6. School districts are permitted to award "certificates" to handicapped students unable to pass the basic competency tests who have successfully completed their IEPs (8 NYCRR 103.5).

As we observed earlier, neither of these functionally handicapped students is capable of passing both of the requisite competency tests and, indeed, their IEPs cannot be equated with a course of studies that would prepare them to pass the basic skill tests. In this connection, we note that the prior practice of petitioner board of education awarding diplomas to students who only successfully completed IEPs was not only inconsistent with extant regulations (see 8 NYCRR 103.2[a][1]), but utterly failed to create a legitimate expectation that could rise to the level of a property right in a diploma for succeeding unqualified students. To hold, as did Special Term, that these students had a legitimate expectation that would rise to the level of a diploma upon graduation is to ignore reality and to reject the instruction of the decisional law of the State that a diploma is a credential, by which the conferring institution certifies that the recipient possesses all of the knowledge and skills expected of individuals who have been exposed to a rigorous academic discipline (see *Matter of Olsson v. Board of Higher Educ. of City of N.Y.*, 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150; *Matter of McIntosh v. Borough of Manhattan Community Coll.*, 78 A.D.2d 839, 433 N.Y.S.2d 446, affd. 55 N.Y.2d 913, 449 N.Y.S.2d 26, 433 N.E.2d 1274). We hold this to be true of the high school diploma as well as diplomas granted at the collegiate and graduate level.

No rule or practice of respondents has created any expectation that students who fail the basic competency tests will be graduated from high school or receive a diploma.[7] Indeed, non-

7. Although it was not definitively clarified by the State Education Department until April of 1979 that the requirement of passing basic competency tests would apply to handicapped students, there was no language in any of the proposals or regulations passed prior thereto regarding basic competency tests which indicated that they would not be applicable to all students seeking to graduate from high school.

handicapped students who fail to meet the necessary requirements receive nothing while similarly situated handicapped students may be eligible for a certificate from their local school district (8 NYCRR 103.5). The right to a full and fair education is not at issue in this proceeding. The issue is whether those entities which are constitutionally and statutorily delegated the authority to conduct and manage our State educational affairs can regulate in a manner that insures the integrity of a high school diploma while, unfortunately, denying the receipt of a diploma to some handicapped students.[8] We conclude that while the regulations before us for review have that effect, since those handicapped students with functional mental defects will not be able to successfully complete the basic competency requirement needed for graduation, they do not impinge on any property right of Abby and Richard.

Turning to the issue of an infringement of a protected liberty interest if diplomas are denied the intervenors, we also conclude that no such interest on behalf of Abby and Richard exists. In order to constitute a deprivation of liberty, the stigmatizing statement must be false (*Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92) and it must be made public by a governmental entity (*Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684). At most, respondents will have identified Abby and Richard as not having met the requirements for a high school diploma, which is true. Neither have respondents made any public statement about either intervenor.

8. It must be remembered that not all handicapped students will fail to receive a high school diploma based on their inability to pass the basic competency tests. Since the definition of a handicapped child includes those with physical and emotional problems in addition to those suffering from mental defects (see Education Law, § 4401, subd. 1; 8 NYCRR 200. *1 [cc], it cannot be assumed that the basic competency test requirement adopted by respondents will negatively impact all those students classified as being handicapped.*

Moreover, it is undisputed that Abby and Richard, ages 20 and 21, respectively, were performing at a level expected of elementary students and the record is clear that their mental deficits were *functional*, thereby depriving them of ever advancing academically to the point where they could be reasonably expected to pass the basic competency tests. Thus, the issue of whether the three-year notice that such tests would be required for graduating classes beginning in June of 1979, relied upon by Special Term in holding that the due process rights of these two students had been violated, is irrelevant. No period of notice, regardless of length, would be sufficient to prepare Abby and Richard for the basic competency tests now required for diploma graduation.

[7] However, since the August 8, 1979 order of respondents directed petitioner board of education to reveal the names of all students who had received diplomas in violation of part 103 of the commissioner's regulations, the possibility exists, if respondents prevail in this proceeding, that the list of diploma graduates for 1979 might include handicapped students with remedial mental conditions who, with proper notice, might have had IEPs adopted to meet their needs so as to prepare them to pass the basic competency tests required for a diploma. As to them, a protected property interest may be involved and the issue of notice is, therefore, critical. Accordingly, judicial inquiry is compelled on the issue of whether the notice given in the instant matter complied with the requirements of due process.

Once it is determined that due process applies, and we have concluded that it might with respect to remedial handicapped children, "the question remains what process is due" (*Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484). In answering this question, we must balance the

private interests involved, the risk of an improper deprivation of such interests, and the governmental interest involved (*Mathews v. Eldridge*, 424 U.S. 319, 334—335, 96 S.Ct. 893, 902—903, 47 L.Ed.2d 18). The burden is on petitioners to prove a violation of their due process rights. It has long been the law of this State that, as a matter of substantive law, every legislative enactment is deemed to be constitutional until its challengers have satisfied the court to the contrary (*Montgomery v. Daniels*, 38 N.Y.2d 41, 54, 378 N.Y.S.2d 1, 340 N.E.2d 444). Since it cannot be denied that the State has legitimate reasons for setting diploma requirements in order to protect and insure the integrity of high school diploma, the only issue we need to decide in determining the degree of due process that must be afforded remedially handicapped children is whether the requirement of basic competency tests, after a three-year notice of such a requirement, satisfies the duty imposed upon the States by the Due Process Clause of the Fourteenth Amendment.

[8] In deciding this issue in favor of respondents, we note that the basic competency tests, structured after extensive efforts by the State Education Department to develop and field an examination referenced to State syllabi in language, arts and mathematics, are achievement tests designed to measure what pupils learn. They are not IQ tests. The basic competency tests are fundamental and would form a part of virtually any acceptable reading or mathematics curriculum. As previously noted, the tests are constructed so that the average ninth grade student can answer 80% of the questions correctly. Thus, we are compelled to reject the unsupported evidence of petitioners that the basic competency tests are invalid with respect to content. We also reject petitioners' reliance upon the decisions in *Debra P. v. Turlington*, 474 F.Supp. 244, mod. 644 F.2d 397 (5th Cir.) and *Anderson v. Banks*, 520 F.Supp. 472. While both of these cases

dealt with an attack upon the content validity of examinations for receipt of high school diplomas, in each case the State or school district imposing the competency testing requirement had previously engaged in *de jure* racial segregation in their school systems. In each instance, the courts subjected the tests to strict scrutiny under an equal protection of the law analysis because of the subject classification of race involved, a factor not present here in our due process analysis. In sum, we must conclude that the content validity of the basic competency tests more than adequately resists petitioners' challenge on due process grounds.

[9] Turning to the issue of notice, as an element of the degree of due process owed remedially handicapped children, we hold that the three-school-year notice given here (1976-77; 1977-78; 1978-79) was not of such a brief duration so as to prevent school districts from programming the IEPs of such students to enable them to pass the basic competency tests required for diploma graduation (see *Brookhart v. Illinois State Bd. of Ed.*, 534 F.Supp. 725; *Anderson v. Banks, supra*). Where, as here, those charged with the obligation to manage educational affairs act responsibly and regulate in a manner that is not patently wrong, the courts must defer to the statutory grant of discretion.

Equal Protection Clauses

The Equal Protection Clause of both the Federal and State Constitutions does not prohibit all classifications of persons or require that all persons be treated equally (*Personnel Adm. of Massachusetts v. Feeney*, 442 U.S. 256, 271-272, 99 S.Ct. 2282, 2291-2292, 60 L.Ed.2d 870). The guarantee is equal laws, not equal results. Here, petitioners claim that the use of the basic competency tests creates two classes of students; those who pass and receive a high school diploma and those, like

Abby and Richard and other students handicapped to varying degrees, who cannot pass and are, therefore, denied diplomas. Petitioners, while conceding that their equal protection claims are not governed by the "strict scrutiny" analysis since education is not a fundamental right (*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16; *Alevy v. Downstate Med. Center of State of N. Y.*, 39 N.Y.2d 326, 332-333, 384 N.Y.S.2d 82, 348 N.E.2d 537) and handicapped children as such do not constitute a suspect class (*Matter of Levy*, 38 N.Y.2d 653, 658, 382 N.Y.S.2d 13, 345 N.E.2d 556, app. dsmd. 429 U.S. 805, 97 S.Ct. 39, 50 L.Ed.2d 66), nevertheless argue that this court should not adopt the standard "rational basis" test to determine if the challenged testing procedures are related to a legitimate State purpose. Instead, petitioners urge that we apply the more structured "middle tier" test adopted by the Court of Appeals in *Alevy v. Downstate Med. Center of State of N. Y.*, 39 N.Y.2d 326, 384 N.Y.S.2d 82 348 N.E.2d 537, *supra*. We decline the invitation.

[10] While we agree with petitioners that a careful reading of *Alevy (supra)* supports the view that the courts have recently held several State and Federal acts violative of equal protection guarantees even though rational reasons for their enactment were proffered (*id.* at 334, 384 N.Y. S.2d 82, 348 N.E.2d 537 and cases cited therein), we reject the view that the amendments to respondents' regulations which conditioned receipt of a local diploma upon successful completion of basic competency tests either created separate classifications of high school students or discriminated, even in a benign sense, against handicapped children. Indeed, section 4402 of the Education Law directs that each school district ascertain the number of handicapped children in each district under he age of 21 years and the nature of each child's handicapping condition. Further, subdivision 1(b) of that section mandates that each school district establish a

committee on the handicapped and empowers that body to invite appropriate professionals most familiar with a child's handicap to appear and advise so that evaluation an placement of each handicapped student can be achieved. The immutable mysteries of genetics, accident, disease and illness are the creators of handicapped children, not the State.

This is not to say that separate classifications of high school students do not exist. Rather, it is to say that the unfortunate disparity between handicapped and non-handicapped students is not the creation of respondents. Therefore, we conclude that the policy of requiring all recipients of local high school diploma to succesfully complete the basic competency tests is not State action which intentionally discriminates against a class of persons grouped together by reason of accidents of birth or living so as to invoke the so-called "middle tier" test enunciated in *Alevy v. Downstate Med. Center of State of N.Y. (supra)*. Indeed, the *Alevy* case itself was one in which race (reverse discrimination) was the factor that prompted our highest court to adopt an area of review between the traditional "rational basis" and "strict scrutiny" tests. The fact that respondents in this proceeding concluded that it would be better if handicapped children, with an appropriate period of notice (three years) which we have found adequate, had their IEPs modified upward so as to give them a greater chance of passing the basic competency tests does not create any separate classification of students that should compel the employment of the *Alevy* "middle tier" standard.

[11] Our inquiry is, therefore, only whether petitioners have demonstrated the absence of a rational basis (see *Matter of Levy*, 38 N.Y.2d 653, 658, 382 N.Y.S.2d 13, 345 N.E.2d 556, *supra; Lombardi v. Nyquist*, 63 A.D.2d 1058, 406 N.Y.S.2d 148, mot. for lv. to app. den. 45 N.Y.2d 710, 409 N.Y.S.2d

1029, 381 N.E.2d 616) for the present plan of requiring passage of competency tests by all students for high school diploma graduation. We conclude that they have not and, accordingly, hold that the protection of the integrity of a high school diploma is both a legitimate State interest and one to which the competency testing program is reasonably related.[9]

Disbursements and Fees

Following Special Term's determination on the merits of the petitions, a motion was made seeking a discretionary allowance for petitoner board of education in the sum of $3,000, additional disbursements to that party for expert witness fees exceeding $8,000 and stenographic fees exceeding $2,000, and $15,000 in fees for the intervenors' guardian ad litem. Special Term granted petitoner only $566 for its stenographic services and denied its other requests. The guardian ad litem was allowed $6,000 as his fee and respondents were subsequently held to be the party liable therefor.

[12] With respect to the discretionary allowance unsuccessfully sought by petitoner board of education, we note that a court in which a judgment is entered may award up to $3,000 to any party in a "difficult or extraordinary" case (CPLR 8303, subd. [a], par. 2). It is well settled that granting such an allowance is a matter within the sound discretion of the court and, absent a clear abuse of that discretion, not present here, that determination should remain undisturbed.

9. Since we have concluded that respondents did not violate either the due process or equal protection rights of petitoners, no actions pursuant to section 1983 of the Civil Rights Act are maintainable (see discussion, *supra*).

[13-15] A party to whom costs are awarded is entitled to recover "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court" (CPLR 8301, subd. [a], par. 12). It is well established that only statutory witness fees may be taxed (*County of Sullivan v. Emden*, 59 A.D.2d 957, 400 N.Y.S.2d 376). In our view, expert witness fees are not recoverable under the discretionary provisions of CPLR 8301 (subd. [a], par. 12) absent extraordinary circumstances (*County of Sullivan v. Emden, supra; Matter of Ulster Sewer Improvement, Town of Ulster v. Horowitz*, 54 A.D.2d 808, 388 N.Y.S.2d 40, app. dsmd. 40 N.Y.2d 1079, 392 N.Y.S.2d 1029, 360 N.E.2d 964). We find no extraordinary circumstances present here and hold that Special Term acted properly in denying petitioner board of education additional disbursements for expert witness fees.

[16-18] Finally, counsel fees, including those requested by a guardian ad litem, are based on the importance of the case, the novelty and difficulty of the questions involved, the results obtained and customary fees for similar services (see *Matter of Becan*, 26 A.D.2d 44, 48, 270 N.Y.S.2d 923). Here, while the importance of the case to all parties cannot be denied since the result is determinative, subject to review, of the rights of handicapped children presently attending high school, the issue is not novel. Our courts have consistently struggled with alleged discriminatory practices of State agencies. After reviewing the record in this case and weighing all of the relevant factors, we see no reason for disturbing Special Term's award of $6,000 in attorney's fees to the guardian ad litem and see no reason for increasing that amount due to the guardian's efforts on this appeal. However, since it was the improper act of petitioner board of education which prompted the administrative action taken by respondents which became the subject of this proceeding, the guardian ad litem's fee should be assessed against that party (see CPLR 1204).

Judgment, entered August 5, 1981, modified, on the law, by declaring that the requirements of 8 NYCRR 103.2 are not improper or violative of the statutory and constitutional rights of handicapped students and reversing so much thereof as awarded judgment in favor of petitioners, and, as so modified, affirmed, without costs.

The judgment, entered November 25, 1981, should be modified, on the law and the facts, by directing that the guardian ad litem recover his attorney's fees from petitioner Northport-East Northport Union Free School District, and, as so modified, affirmed, without costs.

Judgment, entered November 25, 1981, modified, 107 Misc.2d 830, 436 N.Y.S.2d 564, on the law and the facts, by directing that the guardian ad litem recover his attorney's fees from petitioner Northport-East Northport Union Free School District, and, as so modified, affirmed, without costs.

APPENDIX C

107 Misc.2d 830

In the Matter of the Application of The BOARD OF EDUCATION OF the NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, "Abby" and "Richard," by their Guardian ad Litem, John P. Bracken, Petitioners,

v.

Gordon M. AMBACH, individually and in his official capacity as Commissioner of Education of the State of New York, and Joseph J. Blaney, individually and in his official capacity as the Acting and/or Deputy and/or Assistant Commissioner of Education of the State of New York, Respondents, for a Judgment pursuant to Article 78 of the CPLR.

Supreme Court, Special Term,
Albany County.

Jan. 23, 1981.

An action was filed on behalf of two handicapped students who had been attending public school to enjoin the Commissioner of Education and the local board of education from enforcing an order invalidating diplomas received by the high school students, and to obtain a judgment validating the issuance of the diplomas to them. The Supreme Court, Special Term, Albany County, Robert C. Williams, J., held that: (1) the standards adopted requiring that a student pass a basic competency test in order to obtain a high school diploma was not

beyond the scope of the power vested in the Board of Regents and the Commissioner of Education; (2) the denial of diplomas to the handicapped students on the basis of failure to meet testing requirements did not violate the nondiscrimination section of the Rehabilitation Act; (3) the Education of the Handicapped Act does not require specific results, and, therefore, the denial of the diploma would not violate the Act; however (4) the notice received by the handicapped students was inadequate, in light of the property and liberty interests the students had in receipt of a high school diploma, where the students had been in school for 12 and 15 years respectively, but were given less than two years' notice that they would be required to meet the basic competency testing requirement.

Enforcement of order enjoined.

Ingerman, Smith, Greenberg & Gross, Northport, for petitioner, Board of Education.

John P. Bracken, East Setauket, guardian ad litem of "Abby" and "Richard."

Robert D. Stone, Albany (Jean M. Coon, Albany, of counsel), for respondents.

ROBERT C. WILLIAMS, Justice

This is an Article 78 proceeding wherein the petitioners seek to permanently enjoin the respondents from enforcing an order of Respondent Blaney, Acting Commissioner of Education,

dated August 8, 1979.[1] Petitioners further seek a judgment validating the issuance of certain diplomas by Petitioner Board of Education of the Northport-East Northport Union Free School District (Board) to the individual petitioners.

The Board brought this matter on by order to show cause issued by the Hon. Con. G. Cholakis on August 15, 1979. Respondents moved to dismiss same on a number of grounds including the limitation upon the review of legislative acts by way of Article 78. In its decision and order of September 18, 1979 this Court citing *Town of Arietta v. State Board of Equalization and Assessment*, 37 A.D.2d 431, 326 N.Y. S.2d 325, found that the matter was properly before it. The Court further held that the respondents were enjoined from enforcing the order complained of pending the determination herein.

The Court *sua sponte* determined that the respective interests of the individual students should be protected. John Bracken, Esq. was appointed Guardian ad litem for the students and permitted to interpose a petition on their behalf.

Pursuant to Civil Practice Law and Rules § 7804 subdivision (h) a trial on the numerous issues of fact presented was held during a one week period in the summer of 1980. As directed at trial, following the completion of the lengthy transcript thereof the parties presented post-trial memorandums and proposed findings, a further opportunity to respond to the initial submissions was permitted, the case was fully submitted as of January 16, 1981

1 That order decreed that: "IT IS HEREBY ORDERED that the Board of Education of the Northport-East Northport Union Free School District transmit to the Commissioner of Education, State Education Building, Albany, New York 12234, by certified mail postmarked not later than 11:00 p.m. on August 17, 1979, the full names and residence, addresses of all students to whom high school diplomas were awarded by the Northport-East Northport Union Free School District in June, 1979, when such students had not met the requirements for a high school diploma set forth in Part 103 of the Regulations of the Commissioner of Education (8 NYCRR Part 103)."

Abby and Richard are handicapped within the definition of the applicable Federal statutes[2], prior to their graduation in June of 1979 they were students in the school district governed by the Board. At the time in question Abby was 20 years old and attended James E. Allen High School in Dix Hills, New York operated by the Board of Cooperative Educational Services (BOCES).[3] She suffers from a neurological impairment[4] which allegedly affects her ability to handle arithmetical computations. Richard was 21 years of age in June, 1979.[5] He was classified by the school district's Committee on the Handicapped (COH)[6] as trainably mentally retarded[7] and attended James E. Allen School in Melville, New York, also operated by BOCES.

2. Education of All Handicapped Children Act (EHA), 20 U.S.C. § 1401; Education Law of the State of New York, § 4401. In order for a state to receive Federal aid it must provide an educational program for handicapped students in compliance with the EHA, 20 U.S.C. § 1412. To effectuate same New York passed Article 89 of the Education Law. Accordingly, the provisions of Article 89 and the regulations promulgated thereunder parallel in substance many of the provisions of the EHA; therefore the Court does not feel duty bound in all instances that refer to both statutes.

3. As described by Dr. McNally, Director of Pupil Services for Northport-East Northport School District, BOCES offers a "modified" high school program comprised of the standard academic subjects required for a high school diploma plus a vocational component. The educational program provided is apparently geared to the individual student.

4. See, 8 NYCRR § 200.4(a)(6), which provides for a neurologically damaged child being classified as handicapped.

5. Pursuant to Article 89 of Education Law of New York, § 4401 a handicapped individual is entitled to a free education until he attains the age of 21.

6. The formation of a COH is mandated for every school district (Ed.Law § 4402(1)(b)), being charged with the evaluation and placement of handicapped students within their respective school districts. Education Law, Article 89; 8 NYCRR Part 200.

7. See, 8 NYCRR § 200.4(a)(1).

Abby and Richard were assigned individual education plans (IEPs) in compliance with federal and state statutes.[8] After being recommended for graduation by their respective schools, the COH on March 18, 1979 recommended both Abby and Richard for graduation on the basis of successful completion of their respective IEPs.[9] By resolution of the Board approved June 18, 1979 both Abby and Richard were awarded local high school diplomas.

At the time of the award of diplomas neither student had met the testing requirement set forth in the Commissioner's Regulations for issuance of diplomas. Section 103.2 of the Regulations of Commissioner of Education (8 NYCRR § 103.2) provides in pertinent part:

> "(a) *Local diploma.* In order to secure a local high school diploma, the following requirements must be met:
>
> . . . . .
>
> (2) The demonstration of competency in the basic skills:
> (i) by passing the following examinations:
> (a) effective June 1, 1979 through May 31, 1981, either the Basic Competency Test in Reading or the Regents Comprehensive Examination in English, and either the Basic Competency Test in Mathematics or a Regents examination in mathematics."

8. 20 U.S.C. § 1414; Ed.Law § 4402.

9. It appears that Abby was recommended for graduation in 1978 by her school. However after consultation with her parents as required under statute she remained in school at their request in order to allow her further participation in a vocational program (Arbor). At the time of trial she was employed full time in the Arbor program.

Absent the request of her parents as set forth above it appears that Abby would have been granted a diploma in 1978 prior to the testing requirement complained of herein.

Both the Basic Competency Test (BCT) in reading and mathematics were administered to Abby. She successfully completed the English exam but failed the mathematics one. Neither BCT was administered to Richard apparently based on a belief that it would be futile for him to attempt to pass the exams.

Robert R. Spillane, Deputy Commissioner of Education, by way of a letter to Eleanor Roll as President of the Board informed the Board that the award of diplomas to Abby and Richard violated Part 103 of the Commissioner's Regulations. The letter further indicated that "Any students who have been issued diplomas but not completed all State requirements have invalid diplomas. You are hereby required to provide the Education Department with the names and addresses of any students to whom you have awarded diplomas in violation of State regulations. These students will then be notified by our Department that their diplomas are not valid."

In response to the above direction the Board by way of letter from Joseph F. Beattie, President, to Commissioner Ambach dated July 24, 1979 respectfully "decline [d] to produce the names of the students to whom these diplomas were awarded." Thereafter the State Education Department issued an order requiring the Board to submit the names requested.[10]

Both the state and local school district receive federal monetary assistance.

The petitioners seek relief from said order alleging same to be "arbitrary, capricious, unreasonable and unlawful." They contend that the respondent in issuing the order complained of and in requiring the passing of BCTs by the individual petitioners as

10. See, footnote number 1, supra.

a prerequisite for the award of a high school diploma violate Article 1, § 11 and Article 11, § 1 of the New York State Constitution, § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the EHA (20 U.S.C. §§ 1401 et seq.), 42 U.S.C. § 1983 (this cause of action is derivative of the alleged violations of § 504 and the EHA), the Equal Protection and Due Process guarantees afforded by the United States Constitution.

A number of eloquent and engaging arguments have been propounded by the petitioners touching on broad questions facing the educational community, however it must be emphasized that the decision of this Court is meant to speak solely to the factual circumstances presented and the issues revolving around same in respect to the individual petitioners, Abby and Richard. While the issues surrounding the propriety of competency testing in general, and more specifically the testing of handicapped children as a "class" are tangentially addressed by this decision it is not the duty nor the intent of this Court to resolve same.

[1] The legislature of this State is charged with the obligation of providing for the "maintenance and support of a system of free common schools, wherein all the children of the state may be educated." New York State Constitution, Art. 11 § 1; *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352. The constitution[11] and the statutes of this State[12] vest the control and management of its educational affairs in the Board of Regents, that power is concomitantly shared with the Commissioner of Education. *Donohue*, supra; *New York City School Boards Association, Inc. v. Board of Education of the City School District of the City of New York*, 39 N.Y.2d 111, 383 N.Y.S.2d 208, 347 N.E.2d 568.

11. N.Y. Constitution, Art. 11, § 2.
12. Education Law § 207.

Pursuant to that broad grant of power the Regents and the Commissioner have historically formulated standards for the granting of diplomas. The standards adopted in Part 103 of the Commissioner's Regulations can not be said to be beyond the scope of the power vested in the Regents and the Commissioner.

While the Court agrees with the respondents that the powers set forth above are extremely broad and that the courts have "unalteringly eschewed" making judgment in respect to broad education policy (*Donohue*, supra at 445, 418 N.Y.S.2d 375, 391 N.E.2d 1352) it is not contended nor would such a contention be palatable that alleged violations of Constitutional or statutory provisions can be hidden behind the cloak of a claim of "educational policy" and as such be beyond judicial review. *James v. Board of Education*, 42 N.Y.2d 357, 397 N.Y.S.2d 934, 366 N.E.2d 1291.

[2] The state has a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education provided. Use of competency testing to effectuate the goals underlying those interests is within the discretion of the Board of Regents and the Commissioner.[13] The petitioners contend however that the application of BCT requirements in respect to Abby and Richard violates § 504 of the Rehabiltation Act of 1973 (§ 504) in that it denies them a benefit or alternatively that it discriminates against them. The statute provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, *soley*, by reason of his handicap, be

13. Though the testing in question has not been shown to be part of a federally approved program, statute provides for the availability of federal financial assistance in instituting competency testing programs. The presence of such a program seemingly indicates the acceptance of competency testing as a legitimate method of improving educational services. § 921 of the Education Amendments of 1978, 20 U.S.C. § 3331.

> excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service..."(29 U.S.C. § 794 (emphasis added))

The petitioners have failed to convince this Court that the denial of diplomas to Abby and Richard on the basis of their failure to meet the testing requirement of Part 103 would violate § 504.

[3,4] *Webster's Third New International Dictionary Unabridged* (1968) defines a diploma as a "document bearing record of graduation from or of a degree conferred by an educational institution." It can not be said that the denial of a diploma based on inability to meet the BCT requirements is the denial of a benefit "solely by reason of" a handicap. An analogy can be drawn to the handicapped person who is wheelchair bound. Section 504 may require the construction of a ramp to afford him access to a building but it does not assure that once inside he will successfully accomplish his objective. Likewise, § 504 requires that a handicapped student be provided with an appropriate education but does not guarantee that he will successfully achieve the academic level necessary for the award of a diploma.

[5] The Supreme Court interpreted § 504 in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed2d 980. While the factual content of *Davis* is distinguishable from the case at bar[14] the Court's construction of § 504 is pertinent:

14. *Davis* addressed the application of § 504 to a hearing impaired woman's attempt to gain admission to nursing school. Thus, the distinction between post secondary education and level of educational services provided in the present case.

> "This is the first case in which this Court has been called upon to interpret § 504. It is elementary that '[t]he starting point in every case involving the construction of a statute is the language itself.' . . . Section 504 by its terms *does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not permissible ground for assuming an inability to function in a particular context.*" (*Davis*, 99 S.Ct. at 2366, emphasis added, citations omitted)

In *Kampmeier v. Nyquist*[18] the Second Circuit stated that the "exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy." *Kampmeier*, 553 F.2d at 299. Even if the Court were to determine that this situation was within the ambit of § 504, it would be compelled to defer to the discretion of the Board of Regents and the Commissioner in their establishment of educational policy. *Donohue*, supra; *N. Y. C. School Boards Assoc. Inc.*, supra. Under the statutes implemented to effectuate the federal policy enunciated in the EHA the power and the duty is placed upon the State Education Department "to formulate such rules and regulations pertaining to the physical and educational needs of such children as the commissioner of edu-

18. 553 F.2d 296. In reviewing the denial of a preliminary injunction the court therein held the exclusion of students who were blind in one eye from participation in contact sports by their school did not violate § 504, therefore the petitioners failed to establish the requisite showing of probability of success on the merits.

cation shall deem to be in their best interests." Education Law § 4403 subdivision (3).[16] In light of the above it cannot be said that the respondents in denying diplomas to the individual petitioners would be violating § 504.

Petitioners further allege that the denial of diplomas by the respondent would be a violation of the EHA in that it would deny the individual petitioners a "free appropriate education" as guaranteed under the EHA. "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, *under public supervision and direction*, and without charge, (B) *meet the standards of the State educational agency*, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." (20 U.S.C. § 1401(18), emphasis added). As set forth supra, Article 89 of the Education Law was promulgated to insure compliance with the EHA, section 4403 subdivision (3) thereof granting the Education Department discretionary power in the development of regulations providing for the education of handicapped students.

"... [T]he Act contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states." *Battle v. Commonwealth of Pennsylvania*, 3rd Cir., 629 F.2d 269. Accordingly, deference should be given to the method employed by the State in attempting to reach their goals. *Battle*, supra; *Donohue* supra. The Commissioner's interpretation of the Education Law is certainly entitled to great weight. *Eisenstadt v. Ambach*, 79 A.D.2d 839, 435 N.Y.S.2d 132 (Third Dept., 1980).

16. See, *Battle v. Commonwealth of Pennsylvania*, 3rd Cir., 629 F.2d 269. Discussion of the intent of the EHA and the burden placed upon the state. *Battle*, 629 F.2d at 272.

[6] The EHA does not require specific results (*Battle*, supra) but rather the availability of a "free appropriate public education." The award of a diploma has not been shown to be a necessary part of an "appropriate public education" therefore denial of same on the basis of failure to meet BCT requirements does not amount to a violation of the EHA.

[7] The provision of educational services is one of the most important functions performed by the state. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. "But importance of a service performed by a State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, at 30, 93 S.Ct. 1278, at 1295, 36 L.Ed.2d 16. Indeed, education is not a fundamental right[17] invoking the application of the "strict scrutiny" test. *San Antonio*, supra; *Matter of Levy*, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556; *Bukovsan v. Board of Education of the City of New York*, 61 A.D.2d 685, 403 N.Y.S.2d 789.

[8] The status of the individual petitioners as handicapped does not place them in a suspect classification. *Matter of Levy*, supra. The Court of Appeals, in *Matter of Levy*, supra, succinctly addressed the equal protection questions presented herein.

17. The propositions contained in the discussion of equal protection herein are applicable to both the Federal guarantee of the 14th Amendment and the New York guarantee enunciated in Art. 1, § 11.

"At the threshold of consideration of any equal protection claim is the determination of the applicable standard of review. Handicapped children as such do not constitute a 'suspect classification' (cf. *Matter of Lalli*, 38 N.Y.2d 77 [378 N.Y.S.2d 351, 340 N.E.2d 721] [illegitimate children]; *Matter of Malpica-Orsini*, 36 N.Y.2d 568 [370 N.Y.S.2d 511, 331 N.E.2d 486][illegitimate children]; contrast *Loving v. Virginia*, 388 U.S. 1, [87 S.Ct. 1817, 18 L.Ed.2d 1010][race]; *Hernandez v. Texas*, 347 U.S. 475 [74 S.Ct. 667, 98 L.Ed. 866][national origin]; *Matter of Griffiths*, 413 U.S. 717 [93 S.Ct. 2851, 37 L.Ed.2d 910][alienage]). Nor is the right to education such a 'fundamental constitutional right' as to be entitled to special constitutional protection (*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16[93 S.Ct. 1278, 1287, 36 L.Ed.2d 16]). *Accordingly, the appropriate standard is not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test. (Montgomery v. Daniels*, 38 N.Y.2d 41, 59 [378 N.Y.S.2d 1, 340 N.E.2d 444]; cf. *Matter of Jesmer v. Dundon*, 29 N.Y.2d 5[323 N.Y.S.2d 417, 271 N.E.2d 905], app. dsmd. 404 U.S. 953 [92 S.Ct. 324, 30 L.Ed.2d 270].)" (at 658, 382 N.Y.S.2d 13, 345 N.E.2d 556, emphasis supplied).

[9] The petitioners contend that a "middle tier" analysis as enunciated by the Court of Appeals in *Alevy v. Downstate Medical Center*,[18] is applicable. In sum the "middle tier" test requires a showing of a substantial relationship to an important governmental interest. See, *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397; *Alevy*, supra.

18. 39 N.Y.2d 326, 384 N.Y.S.2d 82, 348 N.E.2d 537. *Alevy* proposed the "middle tier" test in respect to allegations of "reverse discrimination."

[10] The Court does not agree that the "middle tier" test is applicable. The Appelate Division of this Department, in *Lombardi v. Nyquist*, 63 A.D.2d 1058, 406 N.Y.S.2d 148, motion for leave to appeal denied 45 N.Y.2d 710, 409 N.Y.S.2d 1029, 381 N.E.2d 616, decided more than two years subsequent to *Alevy*, reaffirmed the decision in *Matter of Levy* by holding that "[t]he approriate standard to be applied in reviewing the application of such legislation (Article 89 of Education Law) is 'not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test'" (at 1059, 406 N.Y.S.2d 148 parenthetical added).

[11] The respondents have set forth a number of reasons underlying the development of the BCTs and their use as a standard for the award of a diploma; the improvement of educational services by the detection of areas of deficiency, remediation, protection of the value of high school diplomas. Fully recognizing the policy of noninterference with state educational decisions (*San Antonio*, supra, 43, 93 S.Ct. at 1302; *Donohue*, supra, 445, 418, N.Y.S.2d 375; *Lombardi*, supra, 1059, 406 N.Y.S.2d 148) it has not been shown that the implementation of a BCT program and the applicability of that program to the individual petitioners falls short of having a rational basis and thus violates the Equal Protection Clause.

We now turn to the issue of Due Process. On this point the Court finds that the respondents have fallen short of the necessary Constitutional requirements.

As discussed more fully above, "[i]t is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of academic performance of its students....Notwithstanding this customary 'hands-off' policy, judicial intervention in school affairs regularly occurs when a state educational insti-

tution acts to deprive an individual of a significant interest in either liberty or property....It is well established that when such a deprivation occurs the procedural safeguards embodied in the Fourteenth Amendment are called into play, and courts will not hesitate to require that the affected individual be accorded such protection." *Greenhill v. Bailey,* 8th Cir, 519 F.2d 5, 7; see also, *Goss v. Lopez,* 419 U.S. 565, 574, 95 S.Ct. 729, 736, 42 L.Ed.2d 725; *James,* supra.

The first question which must be addresed is whether the individual petitioners have a property or liberty interest in the receipt of a high school diploma which falls within the ambit of the Due Process protection?

[12] Property interests are not stagnant and fixed concepts but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings..." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. It is clear that absent the BCT requirements in Part 103 of the Commissioner's Regulations there would be no question before this Court in respect to the diplomas issued to Abby and Richard. Indeed those diplomas would be issued in the manner in which the Board has reviewed and issued them presently.

[13] The Court believes that Abby and Richard had a legitimate expectation of the receipt of a diploma therefore the diploma represents a property interest for the purposes of the due process protection. *Debra P. v. Turlington,* 474 F.Supp. 244; *Matter of Goldwyn v. Allen,* 54 Misc.2d 94, 281 N.Y.S.2d 899. The petitioners have produced testimony tending to indicate that the denial of a diploma will have grave consequence in respect to the future life chances of the individual petitioners,

while those factors come into balance in determining what standards the respondents must meet the gravity of the deprivation is irrelevant in deciding that the Due Process Clause applies. *Goss*, supra, 576, 95 S.Ct. at 737.

[14] Further "[t]he Due Process Clause also forbids arbitrary deprivations of liberty" *Goss*, supra, 574, 95 S.Ct. at 736. By stigmatizing an individual or imposing an obstacle which forecloses his freedom in pursuing employment opportunities the state deprives a person of a liberty interest. *Roth*, supra; *Greenhill, supra.*

[15] The testimony at trial tends to indicate that the denial of a diploma would have an adverse effect upon the future employment opportunities of the individual petitioners.

More importantly the Court finds that such denial may stigmatize the individual petitioners. Judge Carr in Debra P., supra presents a cogent argument in addressing his point.

> "Before discussing the validity issues, the Court must refer to a matter which is at the crux of the controversy between the litigants. The test as legislatively created was to be one of functional literacy. Functional literacy has not been defined in a way which is acceptable to either all educational academicians or the public. The testimony, in fact, indicates that there are at least eleven known definitions of functional literacy. What is functional literacy to one person may not be functional literacy to another person, but it is clear that the term 'functional illiterate' has universally negative inference and connotation. While 'illiteracy' is itself a negative and impact ladened word, 'functional illiteracy' further compounds these implications by focusing on the individual's

inability to operate effectively in society. . . . As one of the Plaintiffs' experts commented, students who fail the functional literacy test perceive of themselves as 'global failures.' Another of the Plaintiffs' experts testified that the biggest flaw in the Florida program was its name alone. The Court is in complete agreement. Beyond the economic and academic implications of failure on the test, the stigma associated with the term functional illiteracy is the most substantial harm presented." (at 258).

While *Debra P.* dealt with functional literacy tests in respect to black students the above discussion is relevant to the case at bar. Will Abby and Richard be labeled as incompetent because of their failure to pass basic competency tests and thus considered unable to function in society?

Chancellor Theodore Black in a letter dated August 16, (Petitioner Exhibit 38) stated, "To grant handicapped students a certificate (an inferior academic award) based on attendance or any other academic standard is to brand a group of students as second-rate and incapable of running the race reserved for other students. Furthermore, such a certificate or any other substitute diploma, does not provide the recipient with the same opportunities for gaining employment or college entrance which accompanies a diploma." In fact a certificate is exactly what the Board of Regents proposes to grant to Abby and Richard. (8 NYCRR 103.5). Denial of a diploma is a deprivation of liberty, thus the protections afforded by the Due Process Clause are invoked.

[16] "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. Due Process is a practical and flexible concept. *Goss*, supra; *Morris-*

sey, supra. In determining the applicable requirements the Court balances the private interests of the petitioners, the risk of an improper deprivation of such interest and the governmental interest involved. *Mathews v. Elridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18.

[17] Petitioners request that the Court find the BCTs as applied to handicapped students invalid thus violative of the Due Process Clause, in that it does not accurately measure "Basic Competency" in respect to handicapped students. While questions of validity are raised by the record (no clear definition of "Basic Competency"; testimony by Winsor Lott, Chief of the Bureau of Elementary and Secondary Testing Programs, that the handicapped student population was not taken into account in development and construction of the exam; applicability of the American Psychological Association, Standards for Educational and Psychological Tests and compliance therewith), the Court in deference to the broad discretionary powers constitutionally and statutorily granted to the Board of Regents and the Commissioner as discussed more fully above, and more importantly due to the rule of judicial restraint does not determine this case on the basis of whether the BCTs are valid in respect to handicapped children.

The Court finds that the respondents failed to provide timely notice of the diploma sanction contained in Part 103 of the Commissioner's Regulations.

[18] The record reflects that Abby and Richard attended public schools for twelve and fifteen years respectively. It is apparent that their programs of instruction were not developed to meet a goal of completing a BCT in order to receive a diploma but rather were developed to address individual educational needs. Indeed, since the requirement of BCTs was first noticed to the administrators of their school in April of 1976 there was

no way the developers of their educational programs could have considered the ultimate requirement of passing a BCT and built that goal into their educational programs.

The school district was notified in April, 1976 that the Board of Regents passed a BCT requirement effective June, 1979 as a pre-condition to the award of a diploma. There appears to have been continuous discussion within the Education Department as to the applicability of the BCT requirement to handicapped students and confusion on the part of the school administration as to such applicability. In April, 1979 Information Bulletin #9 (Petitioners' Exhibit 27), which addressed the BCT in respect to handicapped students, clarified that handicapped students must satisfy the requirements of 8 NYCRR 103.2 to be awarded a diploma. The Bulletin further elaborated upon alternative testing procedures for certain handicapped students, none of which are applicable to the individual petitioners.

The petitioners obstensibly contend that the various reconsiderations and review mechanisms employed set the date that the Court should consider as the point of notice on April, 1979 a few short months prior to the June, 1979 graduation date. The Court while recognizing that the procedures followed did not provide for the clearest and most articulate notice considers April, 1976 as the point of notice to the Board. It does not appear that any notice was provided to the individual petitioners or their parents. Article 89 of the Education Law clearly favors a policy of providing notice to the parents of handicapped students of matters which affect their children's eduction. (See, § 4402, 1(b)(3)(c)). The Court however does not find the lack of individual notice to the parents dispositive of this point.

The Court finds that based on the factual circumstances presented the notice provided was not timely. The denial of a

diploma could stigmatize the individual petitioners and may have severe consequences on their future employability and ultimate success in life. Accordingly, early notice should have been provided in order to afford them every opportunity to pass the BCTs.

[19] Doctor Madus an eminently qualified expert in the area of competency testing testified that in light of the importance attached to these tests early notice was essential. In response to an inquiry by the Court he stated that, "I would like to have seen the students know about that in the middle—sometime in the middle of their elementary school; fourth or fifth grade..." (Transcript p. 475). In reviewing the time frame requirement for notice it must be emphasized that while these students participated in a program of instruction in the same basic subjects taught to all students the methods and goals utilized were directed to their individual needs therefore the time frame for notice to them is much more crucial than that for non-handicapped students in conventional programs.

Robert R. Spillane, Deputy Commissioner of Education, in a memorandum dated August, 1978 (Petitioner's Exhibit 30) states:

> "1. *Early Identification.* One of the most important features of the new Regents competency testing program is the *early identification of students who need special help* in developing their skills in reading, writing, and mathematics. *This identification process must begin at the first point of contact between student and school and must continue throughout the student's years in school.* The process should make use of both formal and informal assessment techniques and should lead to a meaningful and effective program of special help." (emphasis added).

The necessity of early notice is further emphasized by the following direction contained in Information Bulletin #29 dated February, 1980 (Petitioner's Exhibit 31).

> "The purpose of this bulletin is to inform districts that all children identified as handicapped by Committees on the Handicapped and who exhibit academic competency, must have available to them every educational opportunity to attain a high school diploma. *These opportunities include: the handicapped pupil's full participation in the school-wide administration of the Pupil Evaluation Program (PEP) tests in grades 3 and 6, as well as the preliminary competency tests in grades 8 or 9, appropriate remedial instruction as indicated by the test results,* and access to the required curriculum sequence of course work necessary to attain a high school diploma. These opportunities must be made available to all identified handicapped children in any school placement including those conducted by the Boards of Cooperative Educational Services." (emphasis added).

Early notice would allow for proper consideration of whether the goals of the students IEP should include preparation for the BCT and would afford an appropriate time for instruction aimed at reaching that goal. The period of notice provided, in essence less than two school years, was inadequate. The Court is not compelled nor is it deemed provident at this juncture to set a specific time period which would be adequate.

Accordingly, the enforcement of the order issued by Respondent Blaney dated August 8, 1979 is permanently enjoined. Further the Court finds that the diploma requirement contained in 8 NYCRR 103.2(b) is improper as to the individual petitioners Abby and Richard.